BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BETTY J. HARMON Claimant	)	
VS.	)	
YMCA OF WICHITA Respondent	)	Docket Nos. 1,008,083 and 1,012,530
AND	)	
SAFEGUARD INSURANCE CO. and LIBERTY MUTUAL FIRE INS. CO. Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, Liberty Mutual Insurance Co., (Liberty Mutual) and claimant requested review of the October 3, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on January 6, 2009. Stephen L. Brave, of Wichita, Kansas, appeared for claimant. Samantha N. Benjamin-House, of Kansas City, Kansas, appeared for respondent and Liberty Mutual. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier, Safeguard Insurance Company (Safeguard).

In Docket No. 1,008,083, the Administrative Law Judge (ALJ) found that claimant sustained an accidental injury on December 2, 2002. Claimant was awarded a 16 percent permanent partial impairment to her right upper extremity and a 3 percent permanent partial impairment to her right lower extremity. In Docket No. 1,012,530, the ALJ found that claimant met with personal injury arising out of and in the course of her employment on March 31, 2003. The ALJ seems to have determined claimant suffered a permanent impairment of 10 percent to the body as a whole due to the neck injury. She was awarded a 74 percent work disability based on a 100 percent wage loss and a 48 percent task loss. The ALJ concluded that claimant's injury of March 31, 2003, was not a natural and probable consequence of the December 2, 2002, work-related injury, and that Liberty

Mutual was not entitled to reimbursement for the medical treatment expenses and temporary total disability compensation it paid in that docketed claim.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent and Liberty Mutual argue that claimant did not sustain an injury by accident on March 31, 2003, that arose out of and in the course of her employment with respondent but, instead, contend that her neck and left upper extremity problems were the result of her work-related injury of December 2, 2002. Respondent and Liberty Mutual request reimbursement in the amount of $98,141.68 from Safeguard for payments Liberty Mutual made to claimant for temporary total disability compensation and medical benefits. In the event the Board finds that claimant sustained a new injury on March 31, 2003, respondent and Liberty Mutual assert that claimant suffered no new impairment as a result of that injury over the impairment rating she received from a previous work-related injury. Respondent and Liberty Mutual agree with the ALJ that claimant is not permanently totally disabled. Respondent and Liberty Mutual, however, argue that the ALJ erred in finding that claimant is entitled to a work disability because her termination was not due to a work restriction from the March 31, 2003, accident, she did not make a good faith effort to find employment, and there is no medical testimony that shows she has a task loss caused by the March 31, 2003, accident.

Claimant contends the ALJ properly found that she met with personal injury on March 31, 2003, that arose out of and in the course of her employment with respondent and that the benefits paid by Liberty Mutual were not paid in error. Claimant asserts the ALJ erred in not finding that she is permanently totally disabled. In the event the Board finds that claimant is not permanently totally disabled, she asserts the ALJ did not err in awarding work disability.

Respondent and Safeguard request that the ALJ's Award be affirmed with respect to Docket No. 1,008,083 and the injuries alleged in Docket No. 1,012,530 should not be found to be a direct and natural consequence of the earlier injuries in Docket No. 1,008,083.

The issues for the Board's review are:

(1) Did claimant sustain a new and separate personal injury by an accident on March 31, 2003, that arose out of and in the course of her employment with respondent?

(2) If not, is Liberty Mutual entitled to reimbursement for the temporary total disability compensation and medical benefits it paid?

(3) What is the nature and extent of claimant's functional disability in Docket No. 1,012,530?

(4) Is claimant entitled to a work disability in Docket No. 1,012,530?

(5) Is claimant permanently and totally disabled?

FINDINGS OF FACT

Claimant was employed by respondent as a teacher in conjunction with a partnership between respondent and U.S.D. 259. She injured her right arm, hand, elbow and shoulder and right knee when she slipped and fell on December 2, 2002. These injuries are the subject of Docket No. 1,008,083. Claimant was treated at the Wichita Clinic. She was referred to Dr. Kenneth Jansson for treatment to her right knee and to Dr. George Lucas for treatment to her right upper extremity. Claimant saw Dr. Jansson on December 12, 2002. He did not take her off work but placed restrictions on her of occasional kneeling, squatting, and climbing stairs or ladders. She was conservatively treated until April 11, 2003, when she underwent arthroscopic surgery on her right knee. She was taken off work from the date of surgery until April 28, 2003, when she was allowed to return to work with restrictions of no kneeling, squatting, or climbing ladders. She could climb up or down stairs two to three times a day. He released her as being at maximum medical improvement (MMI) on November 12, 2003, with no restrictions.

Dr. Lucas, a board certified orthopedic surgeon, first saw claimant on January 8, 2003, concerning injuries to her right elbow. Dr. Lucas placed her on light duty with no twisting of her right arm and no lifting more than 10 pounds with her right arm. He treated her conservatively. Those restrictions were continued after her visits to Dr. Lucas on February 17, 2003. On March 12, 2003, Dr. Lucas specified that claimant should do no extensor lifting with her right arm.

The ALJ found that claimant was entitled to a 16 percent permanent partial impairment to her right upper extremity and a 3 percent permanent partial impairment to her right lower extremity as a result of the December 2, 2002, accident. These findings were not appealed. As none of the parties dispute the ALJ's findings in this regard, the Board affirms the ALJ's determination concerning the nature and extent of claimant's permanent partial disability in Docket No. 1,008,083, except as it may relate to the issue of natural and probable consequence in Docket No. 1,012,530. That issue will be decided below.

Claimant alleges that on March 31, 2003, she suffered a subsequent work-related injury. This is the subject of Docket No. 1,012,530. On that day, she states she was unloading some books and supplies from a box when she heard a pop and felt pain in the back of her neck and down her left arm. Claimant testified that at the time, she was under

restrictions from Dr. Lucas that she should not use her right arm for lifting because of the December 2, 2002, injury.[1] She was able to continue working that day but was unable to work the next day because she could not lift her left arm. She saw her personal physician, Dr. Secrist, and she also returned to Dr. Lucas on April 30, 2003. Although this was after the March 31 accident, claimant did not complain of any neck or left shoulder problems to Dr. Lucas.

Claimant again saw Dr. Lucas on June 24, 2003, at which time she was complaining of continuing pain in her right elbow that had worsened even though she had been off work. She also complained of left shoulder pain. She told Dr. Lucas about the incident in March 2003 when she lifted some books and felt a pop and pain into her shoulder. He performed an examination of both her right and left upper extremities. He found that claimant was tender over the right lateral epicondyle and had decreased sensation with a Tinel's sign over the wrist which produced a radiation of pain and numbness up the forearm. She had no weakness She had limitation in motion of the left shoulder, pain with resisted elevation, and a mildly positive impingement sign. He believed that she had rotator cuff tendinitis and suggested physical therapy. He did not provide any treatment for claimant's left upper extremity because he was only authorized to treat the right upper extremity.

Dr. Lucas summarized overcompensation injuries as "BS" and did not believe that claimant's problems with her left upper extremity are a natural and probable consequence of the right arm injury. Because claimant worked as a teacher, he did not think she would be doing enough lifting with either hand to create an overcompensating problem.

Eventually claimant was treated by Dr. Paul Stein for her left-sided neck and upper extremity problems. Dr. Stein ordered physical therapy for her neck. She had an MRI and a nerve conduction study of her left arm and neck. Dr. Stein diagnosed her with a ruptured disc. She had epidural steroid injections and a cervical myelogram/CT scan. In November 2004, Dr. Raymond Grundmeyer performed C4-5 and C6-7 laminectomies, diskectomies and fusion with instrumentation. Claimant has been receiving treatment from Dr. Jon Parks for pain management for her neck injury.

Dr. James Zarr is board certified in physical medicine and rehabilitation, as well as electrodiagnostic medicine. He examined claimant on September 7, 2005, at the request of respondent and Liberty Mutual in regard to injuries she received in the March 31, 2003, accident.

Claimant told Dr. Zarr she had persistent neck pain. She had undergone two surgeries on her neck. The first surgery, which had been performed by Dr. Stein, was the

[1] Dr. Lucas restricted her to light duty, stating she should avoid extensor lifting using her right arm.

result of injuries from a car accident in 1992 and was at the C5-6 level. The second surgery was the result of the March 31, 2003, injury. It was performed in November 2004 by Dr. Grundmeyer and involved C4-5 and C6-7. Dr. Zarr examined her, and he did not find any atrophy in her upper extremities or neck. He found she had a 5 out of 5 muscle grade, which is normal. He diagnosed her with persistent neck pain, post C4-5 and C6-7 laminectomies, diskectomies and fusion with instrumentation, as well as status post previous C5-6 laminectomy with diskectomy and fusion. He opined that claimant was at MMI. He believed that claimant's current symptoms were due to the work-related injury of March 31, 2003. He recommended claimant be provided with a sequential electrical stimulator unit and continue the use of analgesics. He did not recommend further surgery.

Using the AMA *Guides*,[2] Dr. Zarr opined that claimant was in diagnosis related estimate (DRE) Category IV and rated her as having a 25 percent whole body permanent partial impairment. He testified that claimant's previous fusion would have placed her in the same Category IV with a 25 percent impairment and, therefore, claimant had no additional impairment from the work accident of March 31, 2003.

Dr. Zarr referred claimant for a functional capacity evaluation, but claimant was unable to complete the evaluation. Before testing was started, claimant was asked her pain level, and she said she was a 10 out of 10 in pain. When it was explained that when someone was at a 10 pain level, usually there is a need to call 911, claimant continued to insist that she was at a 10 pain level. Her blood pressure was 158/96 and her pulse was 112. Claimant did not appear to be in distress. The therapist called Dr. Zarr, who suggested claimant try her best and do as much as she could. Claimant was then able to complete part of the test but not all. Dr. Zarr testified that if an individual was experiencing 10 out of 10 pain, he would expect the blood pressure and pulse to be much higher. The therapist believed claimant completed enough to gain some valid results. However, Dr. Zarr did not believe that the FCE results were reliable or valid. Therefore, when he was asked to review the job task list prepared by Jerry Hardin, he was unable or unwilling to comment.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. He examined claimant on April 10, 2007, at the request of claimant's attorney. At the time, claimant was complaining of neck pain radiating into the shoulders, arms and hands; right knee pain; popping and grinding in the right knee; numbness and tingling in both hands; swelling in both feet; left knee pain; headaches; sleep disturbances; neck pain that traveled down her spine; and difficulty swallowing.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant reviewed claimant's history of the accidents and medical treatment. Claimant told Dr. Murati about the trip and fall on December 2, 2002. Concerning the March 2003 incident, she reported that she began to have pain in her left upper extremity in March 2003 which she attributed to overuse since her right upper extremity injury. She did not report to Dr. Murati that she felt a pop after lifting a textbook, but he said he would not have any reason to disagree with that mode of injury. He performed a physical examination of claimant, after which he diagnosed her with left rotator cuff tear; bilateral carpal tunnel syndrome; right ulnar cubital syndrome; right lateral epicondylitis with radial nerve entrapment; double crush syndrome; status post C4-5 and C6-7 laminectomies, diskectomies and fusion with instrumentation; status post previous C5-6 laminectomy with diskectomy and fusion; myofascial pain syndrome affecting the right shoulder girdle and extending into the thoracic and cervical paraspinals; right patellofemoral syndrome; status post right knee surgery; and dysphagia.

Dr. Murati placed the following restrictions on claimant: No heavy grasping with either hand, no repetitive grasping with the right hand, only occasional grasping with her left hand. She should use repetitive hand controls only occasionally with the right hand and frequently on the left. Dr. Murati believed that claimant is realistically unemployable. He believed her diagnoses are a direct result of the work-related injuries that occurred December 2, 2002, and every working day thereafter and March 31, 2003, and every working day thereafter.

Based on the AMA *Guides*, Dr. Murati rated claimant's permanent partial impairment as follows:

For right carpal tunnel syndrome, 10 percent of the right upper extremity;
For right ulnar cubital syndrome, 10 percent of the right upper extremity;
For right radial nerve entrapment, 10 percent of the right upper extremity;
For right epicondylitis, 3 percent of the right upper extremity;
For loss of range of motion of the right shoulder, 4 percent of the right upper extremity.
These combine for a 32 percent right upper extremity impairment, which converts to a 19 percent whole person impairment.
For left carpal tunnel syndrome, 10 percent of the left upper extremity;
For loss of range of motion of the left shoulder, 9 percent of the left upper extremity;
These combine for an 18 percent left upper extremity impairment, which converts to an 11 percent whole person impairment.
For right patellofemoral syndrome, 5 percent to the right lower extremity, which converts to a 2 percent whole person impairment.
For neck pain status post C4-5 and C6-7 laminectomies, diskectomies, and fusion with instrumentation, Dr. Murati placed claimant in DRE Category IV for a 25 percent whole person impairment. He opined that claimant had a preexisting 15 percent whole person

impairment, which gives her an increased 11 percent whole person impairment when using the Combined Values Chart.

For dysphagia, 10 percent whole person impairment.

Using the Combined Values Chart, claimant's whole person impairments combine for a 43 percent whole person impairment.

Dr. Murati reviewed the task list prepared by Mr. Hardin. Of the 21 unduplicated tasks on that list, Dr. Murati opined that claimant is unable to perform 9 for a task loss of 43 percent.[3] He testified he would only be speculating if he tried to separate those tasks claimant is unable to perform solely due to her neck injury.

Dr. Murati testified that claimant had two accidents in the sense they could be divided by date. Her right carpal tunnel, ulnar cubital, radial nerve entrapment, right lateral epicondylitis, and right patellofemoral syndrome would be her initial injury of December 2, 2002, and the other injuries would be a result of the second injury of March 31, 2003. Dr. Murati believed that claimant had a specific traumatic incident in March 2003 that resulted in specific injuries. Claimant's injuries to her neck and left upper extremity were related to the traumatic incident that occurred in March 2003. He further opined that claimant's left shoulder injury is a result of a combination of overuse and the separate accident, but the neck is a result of the incident in March 2003.

Dr. Murati testified that claimant's lifting restrictions are secondary to all her problems. The bending and stooping restrictions are secondary to her neck. Squatting and kneeling restrictions are secondary to her knees. The ladder restriction is secondary to her neck and knees. Standing and walking would be her knee issue. Forward and overhead reaching would be due to the neck and shoulder problems. Fine hand manipulation and grasping is secondary to the right and left carpal tunnel syndrome and ulnar cubital, radial syndromes. Heavy and repetitive grasp/grab with the right are secondary to the bilateral carpal tunnel syndrome.

Dr. Murati's opinion that claimant is realistically unemployable is a result of a combination of all her injuries. "[T]he neck itself is bad enough, but the rest doesn't help, either."[4] The vast majority of the reason claimant cannot work is related to the March 2003 incident. He does not believe that claimant would have been unemployable if she had only suffered the injuries to her right knee, elbow, hand and shoulder.

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[3] The ALJ found claimant's task loss to be 48 percent, which was Dr. Murati's opinion before eliminating the duplicative tasks from the list.

[4] Murati Depo. at 28.

Dr. Jeanette Salone is board certified in physical medicine and rehabilitation. She examined claimant on July 30, 2007, at the order of the ALJ. Upon examination, she found that claimant had no problems with range of motion, strength or sensitivity. Claimant had a little problem with the abductor of the little finger that Dr. Salone did not think was due to lateral epicondylitis. Dr. Salone examined claimant's shoulders and found she had full range of motion of her shoulders. Dr. Salone found very little problems with her right upper extremity and did not think there was any impairment she could give claimant with regard to the right elbow. She opined that claimant's neck impairment was due to the March 2003 incident, and the impairment to the knee was due to the December 2002 accident. She attributed claimant's March 2003 incident to an exacerbation of her previous neck condition which began in 1992.

Using the AMA *Guides*, Dr. Salone rated claimant as having a 10 percent permanent partial impairment to the whole body for her neck. She did not use the DRE method and instead used table 75 on page 113. This 10 percent rating was specifically for the impairment caused by the aggravation of her preexisting injury on March 31, 2003.

Dr. Salone rated claimant's right knee using Table 62 on page 83 and found claimant had a 7 percent permanent partial impairment for the right lower extremity. She found that claimant had a 0 percent impairment for her right elbow.

Claimant testified at the March 18, 2004, preliminary hearing that she was not currently working because of her medical restrictions from Dr. Lucas and Dr. Stein. She had weight limitations from Dr. Lucas involving her right upper extremity and from Dr. Stein for her neck and left upper extremity. Respondent accommodated her restrictions from Dr. Lucas, and claimant worked until April 10, 2003, when she had surgery on her right knee. She did not return to work after that surgery, because Dr. Stein had taken her off work due to her worsening neck symptoms. As of the date of the regular hearing, claimant was taking pain medications and still had work restrictions.

Claimant began looking for work in January 2008. At the May 27, 2008, regular hearing, she submitted a list of 10 business she contacted concerning employment beginning on January 1, 2008. Only one of the businesses she contacted returned her calls, and it was unable to offer her a position. She has been unable to find a job within her restrictions. Claimant, however, has not looked for work anywhere other than the Wichita newspaper. She testified she was looking for a particular pay and a particular job. She wanted to make at least more than she was making at respondent, which was $7.14 per hour. She also wanted a job that fit into her restrictions. In trying to stay within her restrictions, she was considering her restrictions from both the injury of December 2, 2002, and the injury of March 31, 2003.

Claimant does not have ongoing problems with her right shoulder but still has problems with her right knee, right elbow, and neck. She has had no other injuries since

the accident of March 31, 2003. She has not worked anywhere since leaving work at respondent.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

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[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[8] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[9] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[10] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[11] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[10] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[11] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[12]

In *Logsdon*,[13] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[14] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[15] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[16] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[17]

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[12] *Id.* at 728.

[13] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[15] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[16] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[17] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[18]

[18] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow,*[19] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*, held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."[20]

ANALYSIS AND CONCLUSION

Claimant suffered two separate and distinct traumatic accidents while in the course and scope of her employment with respondent. The first accident occurred on December 2, 2002. The second occurred on March 31, 2003. The second accident was not a direct and natural consequence of the first accident. As a result of the December 2, 2002, accident, claimant has a 16 percent permanent partial disability to her right arm at the 210 week level. She also has 3 percent permanent partial disability to her right leg at the 200 week level. The ALJ's Award in Docket No. 1,008,083 is affirmed.

As a result of the March 31, 2003, accident, claimant suffered an additional 10 percent permanent partial impairment of her cervical spine over and above her preexisting neck impairment. This is a general body disability, not a scheduled injury. Claimant is capable of engaging in substantial gainful employment in at least the sedentary level. She is not permanently and totally disabled. Following her attaining maximum medical improvement from her injuries and being released with permanent restrictions, claimant failed to make a good faith job search.[21] As such, a wage must be imputed to her based upon her capacity to earn wages. The Board finds claimant is capable of working full time and earning at least the minimum wage of $6.55 per hour. As this hourly wage results in a post-accident average weekly wage in excess of 90 percent of claimant's pre-injury

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[19] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[20] *Id.*

[21] See *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), and *Gutierrez v. Dold Foods, Inc.*, __ Kan. App. 2d __, ___ P.3d ___ (No. 99,535 filed January 16, 2009).

average weekly wage, claimant is not entitled to a work disability. Instead, her permanent partial disability must be based upon her percentage of functional impairment. The ALJ's Award in Docket No. 1,012,530 is modified to a 10 percent permanent partial disability to the body as a whole.

The record does not contain a filed fee agreement between claimant and her current attorney, although claimant's former attorney, Paul Dugan, Jr., did file a copy of his fee contract with claimant with the Director. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

Docket No. 1,008,083

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes in Docket No. 1,008,083 dated October 3, 2008, is affirmed.

Docket No. 1,012,530

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 3, 2008, in Docket No. 1,012,530 is modified as follows:

Claimant is entitled to 150 weeks of temporary total disability compensation at the rate of $190.41 per week or $28,561.50 followed by 28 weeks of permanent partial disability compensation at the rate of $190.41 per week or $5,331.48 for a 10 percent functional disability, making a total award of $33,892.98.

As of January 26, 2009 there would be due and owing to the claimant 150 weeks of temporary total disability compensation at the rate of $190.41 per week in the sum of $28,561.50 plus 28 weeks of permanent partial disability compensation at the rate of $190.41 per week in the sum of $5,331.48 for a total due and owing of $33,892.98, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Stephen L. Brave, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier, Liberty Mutual Insurance Co.
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier, Safeguard Insurance Co.
Nelsonna Potts Barnes, Administrative Law Judge